Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1927

JOSEPH D. GENOVESE,

*Petitioner,*

vs.

PEOPLE OF THE STATE OF ILLINOIS,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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**No.**

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**JOSEPH D. GENOVESE,**

*Petitioner,*

vs.

**PEOPLE OF THE STATE OF ILLINOIS,**

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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Petitioner prays that a writ of certiorari be issued to review the judgment of the Illinois Supreme Court of March 29, 1979, whereby that Court denied Petitioner's Petition for Leave to Appeal from the judgment of the Illinois Appellate Court entered on November 15, 1978.

## OPINIONS BELOW

The opinion of the Illinois Appellate Court is reported in 65 Ill. App. 3d 819, 382 N.E. 2d 872 (2nd Dist. 1978) and is reprinted herein as Appendix A, *infra.*

The Illinois Supreme Court issued no opinion when it denied Petitioner's Petition for Leave to Appeal. (See Appendix B)

## JURISDICTION

The judgment of the Illinois Supreme Court was entered on March 29, 1979. A Motion to Stay the Mandate was allowed on April 13, 1979 (Appendix C). This Petition is filed within 90 days of the Final Order of the Illinois Supreme Court. The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1257.

## QUESTIONS PRESENTED

Whether the Sixth and Fourteenth Amendments of the Constitution are violated when a trial judge refuses to instruct a jury regarding legally sanctioned defenses which could reasonably be adduced from the evidence presented at trial because, in the trial court's opinion, said defenses are logically inconsistent.

Is an accused's right to present a defense and to testify in his own behalf at trial impermissibly compromised if



the trial court will be able to consider its perception of the merits of the accused's defense and testimony when passing sentence.

## CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Six to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Amendment Fourteen to the United States Constitution:

> ". . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

## ILLINOIS STATUTES INVOLVED

Illinois Revised Statutes, Chapter 38, Section 6-3:

> A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition either:
>
> (a) Negatives the existence of a mental state which is an element of the offense; or
>
> (b) Is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

## STATEMENT

Petitioner was convicted of armed robbery and aggravated battery (Ill. Rev. Stats., Ch. 38, §§ 18-2 and 12-4) after a jury trial and sentenced to concurrent prison terms of 4 to 9 and 2 to 6 years.

The evidence at trial against Petitioner consisted of:

a.) The testimony of the complaining witness, Thomas Parker. He related that on July 1, 1976, while working at a gas station, he was robbed and beaten by two men with a gun. He could not identify Petitioner as one of the assailants.

b.) The testimony of a sixteen-year-old alleged co-offender, Christopher Lang. Mr. Lang related that he and Petitioner had gone into the gas station and had robbed Mr. Parker. He claimed that Petitioner had beaten Mr. Parker. Mr. Lang further stated that he had seen Petitioner take "angel dust" before the robbery. Mr. Lang testified only after the trial judge threatened him with contempt if he did not. Mr. Lang admitted having given statements to the police which were at variance to his testimony at trial.

c.) A tape recorded confession given by Petitioner to the police. In it Petitioner described the robbery and his participation in it.

Petitioner's defense consistent of a general denial and, alternatively, evidence that he was in such a drugged condition at the time of the offense as to have been incapable of acting knowingly or intentionally. Illinois law specifically provides that such a condition, even if voluntarily induced, is a defense. See Ill. Rev. Stats., Ch. 38, § 6-3, cited above. Illinois reviewing courts have held that intoxication sufficient to negate the intent element is a defense to a charge of armed robbery. See *People* v. *White*, 67 Ill. 2d 107, 365 N.E. 2d 377.



Petitioner testified that on the night of the offense he drank beer, smoked marijuana cigarettes and took angel dust, a mixture of cocaine, morphine, PCP and heroin. He stated that he had been taking the drug every day for two months and had been hospitalized for drug rehabilitation from January until April, 1976.

Petitioner could not recall much of what happened on the night of the offense. He remembered being in a car with friends and falling asleep in the back seat. He felt someone or something shake him. A light came on in the car and he went back to sleep. The next thing he could remember was that someone said they were all going to Louisiana. Petitioner also denied striking or robbing the complaining witness.

Petitioner's testimony was corroborated in the following ways. The teenage co-offender, Christopher Lang, testified that Petitioner took angel dust on the night in question. Petitioner's mother, Mrs. Ghaster, testified that her son was suffering from a drug problem on July 1, 1976. She related that Petitioner was hospitalized for the problem on July 10, 1976 and again on August 21, 1976.

• • •

In keeping with the above evidence, Petitioner requested that the jury be instructed that a drugged person is criminally responsible for his conduct "uniess his drugged condition renders him incapable of acting knowingly or intentionally". These instructions were rejected by the trial court on the basis that they were inconsistent with Petitioner's general denial of the commission of the offense. (trial court transcript; page 674).

• • •

At the sentencing hearing the trial judge admittedly based the sentence imposed on, inter alia, his opinion that at trial, Petitioner had lied on the witness stand about committing the offenses:

> "This defendant, despite, in the court's opinion, overwhelming evidence, still, in this Court's opinion, lied to this Court. This Court does not believe him. . . . This Court is convinced that he knows that he participated, and yet the Court has seen no remorse whatsoever from him in this regard" (trial court transcript, page 776).

• • •

Subsequent to trial, but prior to the sentencing hearing, Petitioner filed a written Motion for a New Trial. (trial court transcript, page 746). Asserted therein was Petitioner's claim that the trial court erred by refusing to instruct the jury on the issue of Petitioner's drugged condition and his lack of intent to commit the offenses (trial court transcript, pages 752, 753). The Motion for a New Trial was denied.

In the Appellate Court of Illinois Petitioner argued, inter alia: a) that the trial court erred in preventing the jury from determining whether Petitioner's drugged condition prevented him from forming the necessary intent to commit the offenses charged solely because his defenses were perceived as inconsistent, b) that the trial court violated Petitioner's rights by considering, when passing sentence, whether Petitioner had told the truth when testifying in defense to the charge (Appendix A). These arguments were repeated in Petitioner's Petition for Leave to Appeal to the Illinois Supreme Court (Appendix D).

This petition follows.



## REASONS FOR GRANTING THE WRIT

1.

**AN ACCUSED IS ENTITLED TO HAVE A JURY CONSIDER ALL LEGALLY SANCTIONED DEFENSES WHICH CAN REASONABLY BE ADDUCED FROM THE EVIDENCE PRESENTED EVEN IF SUCH DEFENSES MAY BE LOGICALLY INCONSISTENT.**

Ignored by the State of Illinois courts was the Petitioner's right to have the jury determine whether his drugged condition could have negated the intent element of the offenses charged. The trial court's refusal to give any instructions on this issue effectively precluded its consideration by the jury—a deliberation supposedly guaranteed by the Illinois Criminal Code. See Ill. Rev. Stats., 1975, Ch. 38, § 6-3, *supra*.

The failure of a trial court to properly instruct the jury concerning the intent or knowledge element of an offense has been held to be "fundamental constitutional error in the light of the Sixth and Fourteenth Amendments." *Casella* v. *United States*, 449 F. 2d 277 at 283 (3rd Cir., 1971).

The sole reason given by the trial judge for refusing to instruct the jury as requested by Petitioner was the fact that the Petitioner had denied the commission of the offenses. That court was of the opinion that inconsistent defenses could not be raised.

The trial court was mistaken and his error was constitutional in magnitude. This Court recognized some time ago that an accused has a right to present inconsistent defenses. See *Lee* v. *Mississippi*, 332 U.S. 742, 68 S. Ct. 300 (1948).

This principle has also been affirmed by the Illinois Supreme Court, although not in this case. See *People* v. *Khamis*, 411 Ill. 46, 103 N.E. 2d 133 (1952).

Rather, in the instant cause the only Illinois court of review which issued a written opinion, the Appellate Court, treated the trial court's ruling as harmless error (Appendix A). It is submitted that, considering the substantial evidence presented regarding Petitioner's drugged condition on the night of the alleged offense, such an approach is contrary to this Court's holding in *Chapman* v. *California*, 386 U.S. 19, 87 S.Ct. 824 (1967). It was there held that before a constitutional error may be deemed harmless, the reviewing court "must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. 23, 24, 87 S. Ct. 824, 828.

Petitioner strongly contends that the trial court's refusal to give the instructions requested—in light of the evidence presented at trial relative to Petitioner's drugged condition at the time of the alleged offenses and in light of the reasons given by the trial court for its denial—violates the Sixth and Fourteenth Amendments of the United States Constitution.

2.

**A SENTENCE IMPOSED SHOULD NOT BE PREDICATED ON A TRIAL COURT'S PERSONAL PERCEPTION OF EITHER THE MERITS OF AN ACCUSED'S DEFENSE OR THE DEMEANOR OF AN ACCUSED WHO TESTIFIES IN HIS OWN BEHALF.**

Prior to this Court's decision in *United States* v. *Grayson*, 438 U.S. 41, 98 S. Ct. 2610 (1978) there was considerable conflict among reviewing courts on the issue of



whether a trial judge may consider at sentencing a defendant's trial testimony which, in light of the fact of conviction, the judge perceives as false. 438 U.S. 41, 45, n. 3, 98 S. Ct. 2610, 2613. In *Grayson*, Justices Stewart, Brennan and Marshall dissenting, this Court held that such consideration by the trial court does not impermissibly chill a defendant's constitutional right to testify on his own behalf or to present a defense.

However, the facts in *Grayson* are peculiar in that the conviction there was for perjury. The defendant's untruthfulness was, therefore, the essence of his conviction. In the instant cause there has never been a finding, as in *Grayson*, that the defendant lied. There is only the perception by the trial court that because the jury convicted the Petitioner must be deemed to have lied.

Petitioner submits that, given the facts of this case, his due process rights to present a defense and testify in his own behalf have been significantly compromised. The trial court's consideration of its opinion of the merit of Petitioner's defense and Petitioner's demeanor as a witness should not be part of the sentencing process. It is no answer to point to the fact of conviction by a jury.

This case presents this Court with the opportunity to clarify the ruling in *Grayson;* to determine in the context of an offense which does not raise truthfulness as an element whether an accused who exercises his constitutional right to plead not guilty and testify in his own behalf should be subject to a sentencing penalty.

## CONCLUSION

The Sixth Amendment, which is applicable to the State of Illinois through the Fourteenth Amendment, mandates the conclusion that the accused should be entitled to have a jury instructed regarding any legally sanctioned defense whose application is suggested by the evidence. The failure here to so instruct compels a reversal.

Fundamental notions of fair play and the constitutional right of an accused to present any legally sanctioned defense should preclude a trial judge from considering his view of the merits of the accused's defense when imposing sentence. This cause should be reversed and remanded with instructions that such an improper consideration not be taken into account on resentencing.

For the foregoing reasons, we respectfully request that the petition for *certiorari* issue in this case.

Respectfully submitted,

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## APPENDIX A

No. 77-274
IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
JOSEPH D. GENOVESE,
Defendant-Appellant.

Appeal from the Circuit Court for the 19th Judicial Circuit, Lake County, Illinois.

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

The defendant was convicted of armed robbery and aggravated battery after a jury trial and sentenced to concurrent terms of 4 to 9 and 2 to 6 years. He appeals, contending that (1) the trial court erred in failing to suppress his confession, since the confession was induced by "implied promises" by the police related to the defendant by his mother; (2) that the trial court erred in refusing to instruct the jury that to sustain the charge of armed robbery, it was necessary for the jury to find that the defendant acted knowingly and intelligently, and that a person who was under the influence of drugs so as to be

incapable of acting knowingly and intelligently was not responsible for his conduct and, (3) that the trial court improperly based the sentence which was imposed on the defendant on the court's conclusion that the defendant had committed perjury. We affirm.

At 1:00 a.m. on July 1, 1976, Thomas Parker was working at a Martin gas station when he observed 2 individuals walk around the back of the building to the area where Parker was sitting. One of the pair asked for a carton of cigarettes. Parker got the cigarettes and told the two that the price was $5. The taller of the two then reached into his back pocket to pull out his wallet but instead lifted his shirt, pulled out a revolver and said, "Will this pay for it?" Parker replied that it would and handed over the money that he had in his pockets. The taller robber told Parker to lay down on the floor. Parker realized that the robber was about to hit him and put his hands over his head and told the individual, "Please don't put me out." The tall robber replied, "Either I am going to hit you or I'm going to shoot you," and then hit Parker four or five times. Parker, who had gained experience with persons on drugs while working as a volunteer counselor, testified that he did not think that the robbers were under the influence of drugs. He was not able to make a positive identification of the offenders.

Christopher Lang, a sixteen-year-old, testified that he had attended a party with the defendant, Kenneth Knoth, Jim Cooney and Long Lauc Lao, on the evening of June 30, 1976. Lang stated that he, the defendant and Knoth discussed the commission of an armed robbery some two weeks before July 1, 1976. After the party, the five went to the Martin Oil Gas Station in a stolen Buick Electra, at about 1:00 a.m. on July 1, 1976. One of the others handed the



gun to the defendant and Knoth told Lang and the defendant to go inside the gas station. It was Lang who asked Parker for a carton of cigarettes, and the defendant who produced the gun and subsequently hit Parker with it. The two then returned to the car and the group left for Louisiana. Lang had seen the defendant take "angel dust" on the evening in question. Although Lang admitted that he had previously given statements to the police which were at variance to his testimony at trial, he had pleaded guilty in juvenile court to the offense of armed robbery. He initially refused to give testimony in this case, and only changed his mind after the trial court held him in contempt.

A tape recorded confession which defendant gave to police was admitted into evidence and played for the jury. In it the defendant answered questions concerning the robbery and related the events of June 30 to July 1, 1976, in considerable detail. For example, he recalled that the carton of cigarettes which he had taken from the service station were Marlboros, that Parker told him the cigarettes cost $5 and that he had responded by producing the gun and asking Parker, "Will this do?" Although the defendant denied that he had threatened to shoot Parker, his confession was in other respects in substantial accord with the testimony of Parker and Lang.

At trial, the defendant testified that he took angel dust composed of cocaine, morphine, heroin and PCP on the evening of the offense and that he had taken the drug every day for two months. He recalled that he left the party in a car with Jim Cooney, Ken Knoth, Chris Lang and Long Lauc Lao and fell asleep in the back seat. He claimed that he was still in the car when he woke up and was told that they were on their way to Louisiana. He asserted that

the police had told him what to say when he gave them the taped confession and that he was suffering from drug withdrawal at the time. The defendant's mother also testified that the defendant was suffering from a drug problem and was under the influence of drugs when he gave his confession.

We turn first to the defendant's contention that the trial court erred in failing to suppress his confession. No purpose would be served by setting forth the testimony heard at the hearing on the defendant's suppression motion; a few salient facts will suffice. On August 20, 1976, the defendant was in Connecticut visiting his father, when the police contacted the defendant's mother in Wheeling and advised her of the charges against the defendant. The officers testified that they told the defendant's mother that it would be in the defendant's best interest if he came back to Illinois on his own, instead of being brought back after being arrested by authorities in Connecticut, that "it would not hurt" the defendant to return home and "try to clear this up," and that the defendant would not be harmed in any way. The defendant's mother and two co-workers recalled the conversation differently, asserting in part that the officers told the defendant's mother that the defendant would not be arrested if he came home, and would not have to go to the penitentiary; the defendant's mother then conveyed these assurances to the defendant, who returned from Connecticut, submitted to custody and gave the officers the taped confession the next morning. At the conclusion of the suppression hearing, the trial court indicated that it did not believe the witnesses presented by the defendant regarding alleged representations by the police. On appeal, the defendant argues that promises or implied promises made by the officers to the



defendant's mother rendered the defendant's confession involuntary. We disagree.

Defendant has cited *People* v. *Ruegger* (1975), 32 Ill. App. 3d 765 and *People* v. *Koesterer* (1976), 44 Ill. App. 3d 468, for the proposition that express or implied promises made to a defendant to induce him to make a statement can render a statement involuntary. (But, see *People* v. *Wipfler* (1977), 68 Ill. 2d 158.) However, in this case, the officer's remark that it would be in the defendant's best interest to return and "clear up" the charges pending against him were directed not at inducing the defendant to make a statement but rather to procure the defendant's submission to lawful authority. The importance of this distinction is obvious, for although the defendant had a constitutional right to remain silent, he had no similar right to evade arrest on the armed robbery charge. Further, the officer's advisement to the defendant's mother, that it would be better for the defendant to turn himself in voluntarily than to be arrested by authorities in Connecticut, was completely accurate and proper. We note that *Miranda* warnings were administered to the defendant before he gave his confession and the record would support a finding that the defendant voluntarily and knowingly waived his rights before he confessed. Therefore, there was no error in the trial court's denial of the defendant's suppression motion.

The defendant's next contention pertains to the trial court's refusal to give certain instructions to the jury. The defendant sought to have the jury instructed that to sustain the charge of armed robbery and aggravated battery, they had to find that the defendant was acting knowingly and intentionally. The defense also asked that the jury be instructed that a drugged person is criminally re-

sponsible for his conduct "unless his drugged condition renders him incapable of acting knowingly or intentionally." These instructions were refused by the trial court, which felt they were not consistent with the defendant's general denial of the commission of the offense. The defendant urges that the refusal to give these instructions constituted reversible error, since intoxication which is sufficient to negate the intent element necessary to support a conviction for armed robbery is a defense to the charge (*People* v. *White* (1977), 67 Ill. 2d 107), and the defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which the defense is based are inconsistent with the defendant's own testimony. *People* v. *Ford* (1968), 39 Ill. 2d 318; *People* v. *Khamis* (1952), 411 Ill. 46.

However, error in refusing to give the instructions tendered by the defendant would not warrant a reversal of his conviction. Error in giving or refusing instructions will not necessarily justify a reversal, when the evidence of the defendant's guilt is so clear and convincing the jury could not reasonably have found him not guilty. (*People* v. *Stewart* (1970), 46 Ill. 2d 125; *People* v. *Ward* (1965), 32 Ill. 2d 253, *cert. denied* 384 U.S. 1022, 16 L. Ed. 2d 1026, 86 S. Ct. 1947.)

Here the testimony of Parker and Lang, when coupled with the defendant's ability to give a detailed confession more than a month after the event (see *People* v. *Long* (1975), 30 Ill. App. 3d 815, 819), belied any claim that the State failed to prove beyond a reasonable doubt that the defendant possessed the requisite intent to commit the offense. In view of the overwhelming evidence of guilt admitted at trial, the jury could not reasonably have found the defendant not guilty, and under the circumstances of this



case, error in the refusal to give defense instructions would not justify a reversal of the defendant's conviction. *Cf.*, *People* v. *White* (1977), 67 Ill. 2d 107.

Finally, the defendant asserts that his high maximum sentence must be reduced since the trial court improperly imposed it, in part because the court was convinced that the defendant committed perjury during the course of proceedings. This assertion is grounded upon certain remarks made by the trial court at the time of sentencing:

> "This Court also is somewhat concerned here with reference to the moral character of this defendant. This defendant, despite, in the Court's opinion, overwhelming evidence, still, * * * lied to this Court. * * * This Court does not feel that the police put the words into his mouth, as he would have me believe.
>
> This Court is convinced that he knows that he participated, and yet the Court has seen no remorse whatsoever from him in this regard."

We do not find that these remarks were improper, or that the trial court erred in considering the defendant's veracity as a factor indicative of his rehabilitative potential. (See, *People* v. *Jones* (1972), 52 Ill. 2d 247; *People* v. *Hayes* (1978), 62 Ill. App. 3d 360.) "[T]he trial judge is normally in a better position to determine the punishment to be imposed than the courts of review" and absent an abuse of discretion, a sentence imposed by the trial court may not be altered upon review. (*People* v. *Perruquet* (1977), 68 Ill. 2d 149, 154.) Here we find that the trial court did not abuse its sentencing discretion.

For the foregoing reasons the judgment of the circuit court of Lake County is affirmed.

*Judgment Affirmed.*

GUILD and NASH, JJ., concur.

## APPENDIX B

State of Illinois
Office Of
CLERK OF THE SUPREME COURT
Springfield 62706

April 29, 1979

Mr. Michael J. Goldstein
Attorney at Law
11 South La Salle Street
Chicago, Illinois 60603

Re: People State of Illinois, respondent,
vs. Joseph D. Genovese, petitioner.
No. 51558

Dear Mr. Goldstein:

The Supreme Court today denied the Petition For Leave to Appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court



## APPENDIX C

State of Illinois
Office Of
CLERK OF THE SUPREME COURT
Springfield 62706

April 13, 1979

Mr. Michael J. Goldstein
Attorney at Law
11 South LaSalle Street
Chicago, IL 60603

In re: People State of Illinois, respondent,
vs. Joseph D. Genovese, petitioner.
No. 51558

Dear Mr. Goldstein:

This office has received and filed your notice, motion and order entered by Justice Thomas J. Moran staying the mandate in the above entitled cause pending the filing and disposition of a petition for writ of certiorari to the Supreme Court of the United States.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

CLW:gn
cc—Hon. William J. Scott
Attorney General
Hon. Dennis P. Ryan
State's Attorney
Lake County
State's Attorneys Appellate
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Elgin, IL 60120

## APPENDIX D

No. 51558
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

vs.

JOSEPH D. GENOVESE,

Petitioner.

Petition for Leave to Appeal from the Appellate Court of Illinois, Second District, No. 77-274. There Heard on Appeal from the Circuit Court for the 19th Judicial Circuit, Lake County. The Honorable Lloyd A. Van Deusen, Judge Presiding.

### PETITION FOR LEAVE TO APPEAL

I.

*Prayer for Leave to Appeal*

Petitioner, Joseph Genovese, pursuant to Supreme Court Rules 315 and 612, respectfully petitions this Court for leave to appeal the decision of the Appellate Court, Second District, which affirmed his convictions for armed robbery and aggravated battery for which he received concurrent terms of four to nine and two to six years in the penitentiary.

II.

* * *



III.

*Compelling Reasons Why Leave to Appeal Should Be Granted*

The petitioner's case presents the question of whether a trial court may enhance the petitioner's sentence where it concludes that the defendant committed perjury at his trial. Leave to appeal should be granted in this case because of the general importance of the question presented and the existence of a conflict between the decision in the petitioner's case and a decision reached in another division of the Appellate Court.

The general importance of the question presented is demonstrated by the number of courts that have recently reviewed the issue. Besides the instant case the issue has been reviewed by the United States Supreme Court in *United States* v. *Grayson,* ..... U.S. ....., 98 S.Ct. 2610, 57 L.Ed. 2d 582 (1978), and by the Illinois Appellate Court in *People* v. *Hayes,* 62 Ill.App.3d 360, 378 N.E.2d 1212 (1st Dist., 1978), and *People* v. *Cowherd,* 63 Ill.App.3d 229, 380 N.E. 2d 21 (4th Dist., 1978). This Court has not yet had an opportunity to review the question.

A conflict between the Appellate Courts exists because in *People* v. *Cowherd,* 63 Ill.App.3d 229, 380 N.E.2d 21, 25 (4th Dist., 1978), the Appellate Court held that a sentence could not be enhanced by reason of the trial court's conclusion that the defendant committed perjury at his trial. The court found that this type of enhancement violated this Court's rule in *People* v. *Riley,* 376 Ill. 364, 33 N.E.2d 872 (1941), which held that evidence of criminal conduct for which the defendant was not tried and convicted was not competent or admissible at a sentencing hearing. Although, the *Cowherd* decision was cited to the Second District Appellate Court, the Court failed to mention the holding in

affirming the defendant's sentence. By abdicating its duty to meaningfully review the petitioner's claim, the Appellate Court has avoided discussing the conflict among the appellate courts and created a situation where the length of a petitioner's sentence may turn on the appellate district which his case arises in.

Leave to appeal should also be granted in this case because it presents the significant issue of whether the petitioner's Sixth Amendment rights were violated when the trial court prevented the jury from determining whether the defendant's drugged condition prevented him from forming the requisite intent for the crimes charged, solely because his defenses were inconsistent.

IV.

* * *

V.

* * *

VI.

*Conclusion*

Petitioner, Joseph Genovese, for the reasons stated above, prays that this Honorable Court grant leave to appeal, and reverse and remand his conviction for a new trial or in the alternative reduce his nine year maximum sentence.

Respectfully submitted,

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